United States Court of Appeals

for the Second Circuit

APPENDIX

76-2155

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MACIO ENNIS,

Petitioner-Appellant,

-against-

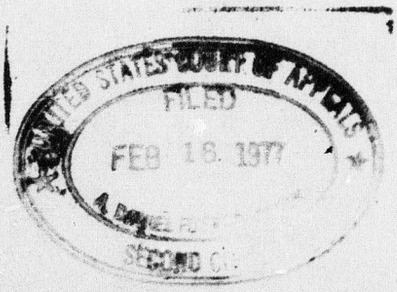
E. LeVRE, Superintendent,
Clinton Correctional Facility,

Respondent-Appellee.

Docket No. 76-2155

APPENDIX

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MACIO ENNIS
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

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APPEALED

PLAINTIFFS

ENNIS, MACIO

MACIO ENNIS

DEFENDANTS

LeVRE, E.

E. LeVRE, Superintendent Clinton Correctional Facility, Dannemora N.Y. 12929

CAUSE

28 U.S.C. SEC. 2254
HABEAS CORPUS

ATTORNEYS

FOR PLTFF:

Pro Se
76 A 446
Clinton Correction Facility
Box B
Dannemora, N.Y. 12929

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76C 900 ENNIS VS LeVRE

DATE	NR.	PROCEEDINGS
5/18/76		Petition for Habeas Corpus filed (1)
6-3-76		By COSTANTINO,J.- Order to show cause dtd. 5-25-76 writ for habeas corpus should not be issued and directing Atty General to file an answer to the petition etc., Copies mailed per order filed. (2)
7-14-76		Summary judgment by granting petition filed. (3)
7-30-76		By COSTANTINO,J.- ~~Cancelled~~ Order extending time for NYS to answer petition to 9-20-76 filed. (4)
9-29-76		Affidavit in opposition filed. (5)
10-13-76		By COSTANTINO,J.- Memo and order dtd. 10-12-76 denying the petition for a writ of habeas corpus filed. (6)
10-14-76		Judgment that the petitioner take nothing of the respondent and that the petition for a writ of habeas corpus is dnied filed. (7)
10-20-76		Petitioner's affidavit in rebuttal filed. (8)
10-29-76		By COSTANTINO,J Memo & Order dtd 10-29-76 denying the motion for reconsideration. The motion to disqualify is also denied. (9)
11-9-76		Letter dtd. 11-3-76 from petitioner to Judge re: treat letter as notice of appeal filed. (10)
11-11-76		Letter dtd. 8-23-76 from pltff to Judge Costantnio re: to have case reassigned and letter from Judge Mishler to pltff re: cam't reassign case filed. (11/12)
11-17-76		By COSTANTINO,J Memo & Order dtd 11-17-76 granting petitioner's application for certificate of probable cause on as to the portion of the court's decision dealing with the absence of the Wade hearing minutes. (13)
11-18-76		ENTIRE FILE CERTIFIED AND MAILED TO C OF A.
11-22-76		Letter dtd. 11-17-76 from peitioner to Judge Costantino filed. (14)
11-22-76		Certifed copy of order from C of A granting petitioner leave to proceed in forma pauperis filed. (15)
11-26-76		Acknow. rec'd from C of A for receipt of file. *16)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MACIO ENNIS,

Petitioner,

v.

E. LeVRE, Superintendent, Clinton Correctional Facility, Dannemora, New York 12929,

Respondent.

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76-C-900

MEMORANDUM and ORDER

COSTANTINO, D.J.

Petitioner was convicted by a jury in New York State Supreme Court of kidnapping, and was sentenced to a term of five to fifteen years in prison. On appeal, the Appellate Division, Second Department modified the conviction to unlawful imprisonment in the first degree and remanded for resentencing. People v. Ennis, 50 App. Div. 2d 935, 377 N.Y S.2d 600 (2d Dep't, 1975). The petitioner was re-sentenced to a term of four years in prison, and leave to appeal to the Court of Appeals was denied. Ennis then filed this pro se petition for a writ of habeas corpus and for leave to proceed in forma pauperis. The motion to proceed in forma pauperis is granted.

(6)

In his petition for habeas corpus relief, petitioner makes three claims: (1) that he was denied due process and equal protection by the absence of the minutes of the Wade hearing from the record on appeal; (2) the State unconstitutionally compelled him to be represented by a lawyer he did not desire; and (3) that he was subjected to double jeopardy by virtue of the Appellate Division's modification of his sentence.

Petitioner's first claim is without merit. He argues that he was denied due process and equal protection because, due to his indigency, the minutes of his Wade hearing were not included in his record on appeal. This claim is totally unsupported by the record. While it is true that the minutes of the Wade hearing were not included in the appellate record, there is nothing to indicate that the petitioner was denied access to the minutes by any action on the part of the State, or that he was denied access due to his indigency. In fact, it appears that the minutes were available, but were never properly requested either by petitioner or his counsel. Moreover, there are no allegations in the petition as to how petitioner was prejudiced by the omission of the minutes from the record.

He does not allege that there were defects in the hearing procedure or that the inclusion of the minutes in the record on appeal would have in some way altered the outcome of his appeal. Absent such allegations going to the validity of the hearing procedure or to the sufficiency of the evidence adduced at the hearing, petitioner's due process and equal protection claims must be denied. See United States ex rel. Buford v. Henderson, 524 F.2d 147 (2d Cir., 1975), cert. denied, ____U.S.____, 96 S.Ct. 1133 (1976).

Petitioner's second contention is also unpersuasive. It appears from the papers in this case that petitioner was not seeking to have his appointed counsel relieved so that he could proceed pro se, see Faretta v. California, 422 U.S. 806 (1975), but rather so that he could have another attorney appointed to represent him. It is not clear from the petition whether the motions to replace counsel were raised during trial or were made for the first time with respect to the prosecution of the appeal. However, at neither time did petitioner have the "unbridled right to reject counsel and demand another." United States v. Calabro, 467 F.2d 973 (2d Cir., 1972), cert. denied, 410 U.S. 926 (1973), reh.

denied, 411 U.S. 941 (1973). See also United States v. Tortora, 464 F.2d 1202, 1210 (2d Cir.), cert. denied sub. nom. Santoro v. United States, 409 U.S. 1063 (1972). ("No defendant has an absolute right to any particular counsel.")

In order to warrant a substitution of counsel, the defendant must show good cause, such as a conflict of interest. United States v. Calabro, supra. In the case before this court, while petitioner has used the words "conflict of interest" in his petition, he has alleged no facts which justify the conclusion that such a conflict existed. Differences between attorney and client over strategy are not of themselves sufficient to require replacement of counsel, particularly where the attorney indicates his willingness to continue with the case. Calabro, supra at 986.

Here, it is true that petitioner's counsel filed papers with the Appellate Division to the effect that he would not oppose his client's motions to relieve him. When the motions were denied, however, counsel continued to prosecute the appeal. The effectiveness of counsel's efforts is evidenced by the fact that he obtained a

modification of the conviction. Petitioner has failed to show that there was good cause to replace his attorney and he has failed to show that the assistance he received was ineffective. Therefore, his petition cannot be granted on those grounds.

Petitioner's double jeopardy claim is equally without merit. As the Supreme Court recently stated in Breed v. Jones, 421 U.S. 519, 530 (1975), "the Double Jeopardy Clause . . . is written in terms of potential or risk of trial and conviction, not punishment." Since petitioner was never subjected to a second trial, there was no violation of the Double Jeopardy Clause.

In light of the above discussion, the petition is denied. So ordered.

U. S. D. J.

ing him of assault in the first degree, assault in the second degree and possession of a weapon, dangerous instrument and appliance, as a misdemeanor, upon a jury verdict, and imposing sentence, and (2) (by permission) an order of the same court, dated December 10, 1974, which denied, without a hearing, his motion to vacate the judgment. Judgment and order affirmed. No opinion. Martuscello, Acting P. J., Latham, Margett and Brennan, JJ., concur; Shapiro, J., concurs, with the following memorandum: Defendant was indicted for murder and, in separate counts, for assault in the first and second degrees and possession of a weapon, dangerous instrument and appliance, as a misdemeanor. He was acquitted of murder and manslaughter in the first degree. He was found guilty of assault in the first degree, assault in the second degree and possession of a weapon. Although the verdict may be inconsistent, that is not a ground for setting it aside where the defendant has been indicted for separate crimes in separate counts (*Dunn v United States,* 284 US 390; *People v Sciascia,* 268 App Div 14, affd 294 NY 927; *People v Williams,* 47 AD2d 262).

34 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MACIO ENNIS, Appellant.—Appeal by defendant from a judgment of the Supreme Court, Kings County, rendered August 19, 1974, convicting him of kidnapping in the second degree, upon a jury verdict, and imposing sentence. Judgment modified as to the conviction, on the law and the facts, by reducing the conviction to one of unlawful imprisonment in the first degree; as so modified, judgment affirmed as to the conviction; judgment reversed as to the sentence, on the law, and case remanded to Trial Term for resentence in accordance herewith. Defendant came up behind his victim in her building's laundry room, put a razor to her throat, and forced her to accompany him to the incinerator room next to the laundry room. He ordered her to remove her clothing, but the building's superintendent walked into the room while she was in the process of removing her clothing, whereupon defendant fled. Defendant was convicted of kidnapping in the second degree. That conviction cannot stand. The proof of kidnapping in the second degree (Penal Law, § 135.20) was insufficient as the evidence revealed that any detention of the victim was incidental to the commission of the crimes of attempted rape and sexual misconduct (cf. *People v Watts,* 48 AD2d 863; *People v Usher,* 49 AD2d 499; *People v Lombardi,* 20 NY2d 266). As the crime of unlawful imprisonment in the first degree was established beyond a reasonable doubt, the judgment has been modified accordingly. Latham, Acting P. J., Cohalan, Margett and Brennan, JJ., concur; Munder, J., dissents and votes to reverse the judgment and dismiss the remaining count of the indictment, with the following memorandum: The kidnapping statute does not apply to crimes which are essentially robbery, rape or assault in which some confinement or asportation occurs only as a subsidiary incident of the robbery, rape or assault (*People v Lombardi,* 20 NY2d 266, 270; *People v Usher,* 49 AD2d 499). The incidental restraint in such cases merges, as a factual matter, into the ultimate crime (*People v Miles,* 23 NY2d 527, 539). If no independent "kidnapping" crime remains, there cannot survive, as a lesser included offense, any crime such as unlawful imprisonment. The merger of the higher crime carries with it the merger of the lesser included offense as well.

35 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v LOUIS FARRUGIA, Appellant.—Judgment of the County Court, Westchester County, rendered September 17, 1973, affirmed. The error in the charge, when considered in context, was not prejudicial (cf. *People v Crimmins,* 36 NY2d

Heyward C. Davis
Court Reporter
Supreme Court, Kings County
360 Adams Street
Brooklyn, New York

R-15

RE: Indictment Number 1701/73

Peo. v. Macio Ennis

Mr. Ennis, I am in receipt of your letters in reference to a hearing that took place during your trial. But, you have not given me the dates or the witnesses. I know that there was a hearing and I can remember what happened, but I don't know exactly what you want. I am willing to get you the minutes if you give me more specifics on it. Also you have not indicated how you wish this to payed for. Are you asking for them as a part of your appeal? If so, please give me the necessary forms to pay for the minutes. If you are going to pay for them privately, please notify me of this.

Respectfully Yours
Heyward C. Davis

C-(3)

Supreme Court of The State Of New York
Appellate Division : Second Dept.
- -X

The People of The State Of New York,

Respondent,

against

Indict # 1701-73

Macio Ennis,

Appellant-Defendant

- -X

State & County Of New York S.S.

David Feinman, attorney for appellant appointed under 18 B of the County [illegible] affirms as follows under penalty of perjury:

I have no objection to be relieved as counsel on this appeal. Defendant appellant has made numerous pro se motions to reduce bail without seeking my advice, all of which were denied. He constantly seeks to direct all legal proceeding acting as his own lawyer though counsel has been appointed to help him, and there should not be two captains on a ship.

I have completed the annexed brief made part hereof, and when I showed it to appellant he was not satisfied with it giving me no reasons. The brief has not been served on the district attorney for filed with this court. It is my opinion that the brief will result in a reversal.

Dated Sept, 2, 1975

_____

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CERTIFICATE OF SERVICE

February 16, 1977

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Leila Jurstein